Now the original rule in most of the States had been that, save where special and peculiar equities existed, the collection of illegal taxes could never be enjoined.[4] The prompt and unembarrassed collection of the public revenue was considered vital to the welfare of the State.[5] Though this rule has been very generally modified, the federal court rule and the rule in most States requires the pursuance of a legal remedy where such remedy exists and is adequate.[6]

In 1916, the General Assembly adopted the following Act:

> "Be it enacted by the General Assembly of Virginia, That no suit for the purpose of restraining the assessment or collection of any tax, State or local, shall be maintained in any court in this Commonwealth, except when the party has no adequate remedy at law; provided this act shall not affect any pending suit." [7]

Thus was Virginia brought into line with the more general and, it is believed, the more desirable rule. The purpose of this note is simply to call attention to the fact that this act was not incorporated by the revisors into the Code of 1919 Nor has it found a place in any subsequent legislation. Its omission by the revisors effects its repeal.[8] It would seem, then, that the law stands once more as it stood before the passage of this act in 1916, and that today in Virginia an illegal assessment may be enjoined regardless of the question of existing legal remedies.

T. L. P.

EQUITY—PLEADING—EXCEPTION OR DEMURRER TO ANSWER.—The reports and law books in general are full of statements to the effect that, a demurrer to an answer in chancery is a pleading unknown to the chancery practice. But there have been few cases indeed in which the appellate courts have considered a demurrer to an answer fatal. The usual course is to condemn that particular form of procedure, treat the demurrer as setting the case for hearing on bill and answer, and proceed accordingly.

In the Federal courts the rule laid down in *Crouch* v. *Kerr* [1] that a demurrer does not lie to an answer, the court there refusing to consider the case on the merits but granting the plaintiff leave

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[4] McCoy *v.* Chilicothe, 3 Ohio 370, 17 Am. Dec. 607 (1828); Greene *v.* Mumford, 5 R. I. 472, 73 Am. Dec. 79 (1858). See Note, 69 Am. Dec. 198.

[5] 26 R. C. L. 460.

[6] Greene *v.* Mumford, *supra;* Chicago, etc., Ry. Co. *v.* Ft. Howard, 21 Wis. 44, 91 Am. Dec. 458 (1866); Dodge *v.* Osborn, 240 U. S. 118, 36 Sup. Ct. 275 (1915). See Note, 69 Am. Dec. 198.

[7] Acts 1916, p. 89. See Commonwealth *v.* Tredegar Co., 122 Va. 506 (1918); Commonwealth *v.* Carter, 126 Va. 469 (1920).

[8] Va. Code 1919, § 6567.

[1] 38 Fed. 549 (1889).

to set the case down for hearing on bill and answer. While this has never in any sense been overruled, still, later cases seem to indicate a greater tendency to be guided more by the maxim, "Equity looks to the substance rather than the form," than by the strict pleading rule laid down in the case above.[2]

In the State courts, almost without exception, a demurrer to an answer or plea for insufficiency as a matter of law, is treated as a matter of form, and as if it had been an exception.[3] More specifically the demurrer is treated as setting the plea or answer for argument, i. e. on bill and answer.

The Virginia Court has followed the rule that obtains in most States, and which has just been indicated. Such was the course pursued in *Kelly* v. *Hamblen*.[4] In this case Judge Keith then President of the Court, reserved the point for future consideration since it was not directly in issue. Although the opinion contained the *semble,* "It would seem that it (a demurrer) can only be interposed to a bill," yet the Court proceeded to consider and did hold that that part of the answer demurred to was sufficient in law. In two fairly recent Virginia cases, however, it has been held that an exception to an answer is tantamount to a demurrer.[5] This is unquestionably true when the objection is taken to the answer because it is insufficient as a matter of law. And it would certainly be contrary to the usual practice of equity, in looking to the substance and not to the form, to disallow the pleading, in such cases, because it was called a demurrer instead of an exception. "Though a pleader may mistake the *name* of his pleading, yet, if it be proper in substance, the court will disregard the error and treat the pleading as if it were rightly named." [6]

But despite such lenient rules the fact remains that we have a pleading, which, in every essential but name, amounts to a demurrer to the answer, and performs the function of such a demurrer; yet at the same time it is universally stated that a demurrer to an answer in chancery is a pleading unknown to chancery practice. Naturally this has been the source of some difficulty.

It is submitted that much of the confusion on the point is due to the failure to distinguish between the two uses of an exception, first, To obtain a better answer and secondly, To raise an issue of law, i. e. obtain hearing on bill and answer. In an early federal case [7] it was held that an exception could not be made to an answer

[2] Walker *v.* Jack, 88 Fed. 576 (1898); Barrett *v.* Twin City Power Co., 111 Fed. 45 (1901).

[3] Copeland *v.* McCue, 5 W. Va. 264 (1872); Kidd *v.* N. H. Traction Co., 72 N. H. 273, 56 Atl. 465 (1903); Burge *v.* Burns (Ia.), 1 Morris 379 (1844); Raymond *v.* Simonson (Ind.), 4 Blackf. 77 (1835). See Stone *v.* Moore, 26 Ill. 165 (1861).

[4] 98 Va. 383, 36 S. E. 491 (1900).

[5] Norfolk *v.* Norfolk County Water Co., 113 Va. 303, 74 S. E. 226 (1912); Keys Planing Mill Co. *v.* Kirkbridge, 114 Va. 58, 75 S. E. 778 (1912).

[6] LILE, EQUITY PLEADING AND PRACTICE, p. 83.

[7] Adams *v.* Bridgewater Iron Co., 6 Fed. 179 (1881).

which was insufficient in law as a bar to the plaintiff's suit. Again in an early Iowa case [8] it was stated that the proper course, where the answer, if true, is insufficient, is to set the cause for hearing on bill and answer, which, as the case asserts, is tantamount to a demurrer. Setting the cause for hearing on bill and answer is, of course, what is always done in such cases. But the two cases just mentioned seem to indicate that accurately an exception to an answer for insufficiency in law is not the proper method of doing it. The object of the exception was to secure a better answer. Its use in setting the case for hearing on bill and answer is unfortunate and confusing.[9] In short its only use was to raise a question of form or to obtain a more complete answer and not to raise a question of law. But the term, exception, was soon used to raise both questions and as a result there ensued the dogmatic statement, "A demurrer to an answer in chancery is a pleading unknown to chancery practice." Considering the two uses mentioned above, the former raises no question on the merits of the case and consequently in no way resembles a demurrer, while the latter goes right to the merits and raises an issue of law directly, which, as some cases have stated, is tantamount to a demurrer.[10]

It is respectfully submitted that practice would be simplified by restricting the exception to its early use and for its later use substitute a demurrer in name for what has always been a demurrer in effect.

In this State exceptions for insufficiency are abolished by the New Code and a motion to strike out is subsituted therefor.[11] This would seem to allow a very flexible and informal practice, entirely in keeping with the purposes of equity. But even where such a simple practice is possible a case has recently been decided in which a demurrer was filed to the answer.[12] No objection, however, was made to it in the lower court and the Court of Appeals considered it a substantial compliance with the requirements of the New Code. In a word the demurrer was treated as a motion to strike out.

Evidently a demurrer to an answer is to be regarded in the same manner under the New Code that it was under the old,[13] both of which are splendid examples of the maxim: "Equity looks to the substance rather than the form."

B. D. A.

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[8] Burge *v.* Burns, *supra.*

[9] 21 C. J. 487, 489 (§§ 569, 573, b).

[10] Burge *v.* Burns, *supra;* Norfolk *v.* Norfolk County Water Co., *supra;* Keys Planing Mill Co. *v.* Kirkbridge, *supra.*

[11] V. C. 1919, § 6123.

[12] Withrow's Ex'x *v.* Porter (Va.), 109 S. E. 441 (1921).

[13] For a more complete discussion of the effect of § 6123 of the New Code abolishing "exceptions to answers for insufficiency" see LILE, EQUITY PLEADING AND PRACTICE, p. 121.